

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs December 17, 2008

STATE OF TENNESSEE v. DAVID E. OFFUTT

Appeal from the Criminal Court for Davidson County
No. 2004-A-281 Cheryl Blackburn, Judge

No. M2007-02728-CCA-R3-CD - Filed August 20, 2009

The defendant, David E. Offutt, appeals as of right his jury convictions in the Davidson County Criminal Court for three counts of attempted rape, three counts of attempted incest, and two counts of sexual battery by an authority figure. The trial court imposed consecutive six-year sentences for each attempted rape conviction, merged the attempted incest convictions into the attempted rape convictions, and imposed consecutive five-year sentences for each sexual battery by an authority figure conviction. The trial court ordered each group of sentences to be served concurrently, for a total effective sentence of eighteen years. The defendant contends that the evidence is insufficient to support his convictions, that the trial court erred in admitting evidence of other sexual acts committed by the defendant against the victim, and that the trial court erred in imposing consecutive sentences. Following our review, we reinstate the defendant's convictions for attempted incest and remand for sentencing on those counts; the judgment of the trial court is affirmed in all other respects.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are Reversed in Part; Affirmed in Part; Remanded.

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JERRY L. SMITH and ALAN E. GLENN, JJ., joined.

Laura Clift Dykes, Interim District Public Defender; Kati Weiss and Laura Getz, Assistant District Public Defenders (at trial); and Charles E. Walker, Nashville, Tennessee (on appeal), attorneys for appellant, David E. Offutt.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Brian Holmgren, Assistant District Attorney General, attorneys for appellee, State of Tennessee.

OPINION

A Davidson County grand jury indicted the defendant for ten separate offenses involving acts committed against K.F.¹, his stepdaughter. Counts one and two of the indictment charge the defendant with aggravated sexual battery occurring when the victim was nine years old; the defendant was acquitted of these charges when the jury was unable to reach a verdict. Counts three through five of the indictment charge the defendant with separate acts of raping the victim in a Nashville hotel room on June 26, 2003, when the victim was fifteen years old. Counts six through eight of the indictment charge the defendant with incest relating to the same incident. The jury convicted the defendant of the lesser offenses of attempted rape and attempted incest, respectively, and the trial court merged the attempted incest counts into the attempted rape counts at sentencing. Counts nine and ten charge the defendant with separate acts of sexual battery by an authority figure occurring during the same incident. The jury convicted the defendant as charged in counts nine and ten.

K.F., who was seventeen years old at the time of trial, testified that she had lived in LaVergne, Tennessee for about eight years and was a senior at LaVergne High School. She stated that before moving to La Vergne, she lived in Antioch, Tennessee with her mother and stepfather, the defendant. She testified that during her sophomore year she attended Pearl-Cohn High School where the defendant taught and coached basketball. The victim played basketball while at Pearl-Cohn.

The victim recalled that her mother was pregnant with her baby brother, the defendant's son, while the family lived in Antioch. She related that when she was about nine years old, the defendant woke her up while she was sleeping on the couch in the den. She stated that he initially acted like he was tickling her but then began to slowly rub her chest area outside her clothing; she testified that her breasts were "[a] little" developed at that age. She recalled that the defendant asked her how it felt and she moved his hand away as she rolled away from him. She said that her mother was in bed asleep when it happened. She said that the incident confused and scared her and that she did not tell her mother because "I just didn't know what to say."

The victim testified that at another time when she was watching television in the den, the defendant came into the room, sat on the couch and began rubbing her breasts and then placed his hand on her vagina inside her panties. She said that she began to move around to stop him and the defendant asked her, "are you okay or how does that make you feel?" She testified that she did not respond verbally but would just shake her head and try to move away from him. She said that her mother was the only other person in the house and that she was asleep in bed when this incident happened. She recalled that her brother had not yet been born. She also testified that the defendant told her not to tell her mother. She stated that these two incidents were the clearest in her mind but that the defendant touched her on other occasions.

¹ It is the policy of this court to refer to victims of sexual offenses by their initials.

When asked why she did not tell her mother, she stated that her mother was pregnant at the time and that she (the victim) did not “want all that to be in the way” after her brother was born. She testified that she did tell her mother about the abuse sometime in 2001 when she was twelve years old. She recalled that her mother confronted the defendant about the abuse and that he denied it. She stated that her mother asked the defendant to leave their home for some time, possibly a weekend, but that her mother asked him to return.

During June 2003, the victim attended a basketball camp at Tennessee State University. She recalled that the defendant would take her to the camp and pick her up in the afternoon. On Friday, the last day of the camp, the defendant picked her up and instead of going home, took her to a hotel near the airport. She remembered going to a Ruby Tuesday restaurant next door to the hotel before he rented the room. Although she could not recall the name of the hotel, she remembered that a Corvette convention was going on at the hotel. She said that they checked into the room and the defendant rented a “dirty movie.” She testified that the defendant suggested that he give her a massage and began rubbing her while she was fully clothed. The defendant removed her clothes. The defendant touched the victim’s breast, vaginal area and her “butt.” She testified that the defendant digitally penetrated her vagina. She said that the defendant was also naked. She testified that she never told him to stop but that she did not want him to do any of these things. She stated that he tried to penetrate her vagina with his penis “but he didn’t” except to the point of penetrating the outer area of her vagina. She said that the defendant also “tried to anally penetrate [her]” and that it hurt when he tried to do that. She remembered that the defendant used some sort of lubricant like Vaseline. She recalled that she started to cry and the defendant stopped trying to penetrate her and sat on the edge of the bed massaging her instead. Regarding her demeanor, she said that she “was speechless . . . numb . . . [and] scared.” She testified that the sexual activity lasted “[a]t least an hour” and that “[i]t seemed like forever. But . . . it was still light outside when [we] left.”

The victim testified that, after leaving the hotel, she and the defendant went to Kmart and home. She did not tell her mother about the hotel incident but, within a month, the victim told C.E., her best friend. C.E. encouraged the victim to talk to an adult mentor at their church, Catherine Gallop. About two or three weeks after telling C.E., the victim confided in Ms. Gallop. On October 17, 2003, the victim was interviewed at school by Marlene Baugh, an investigator with the Department of Children’s Services. The victim testified that she did not contact DCS or ask anyone to contact them on her behalf, but that it did not take her long to figure out why Ms. Baugh wanted to talk to her. Following her taped interview with Ms. Baugh, the victim submitted to a gynecological examination. Although the victim was unable to tell detectives or Ms. Baugh the name of the hotel where the incident took place, her memory of a Corvette show and nearby businesses allowed investigators to determine where the incident occurred.

On cross-examination, the victim explained some discrepancies between her prior statements to Ms. Baugh and her testimony at trial. She acknowledged some discrepancies concerning the rooms in the home where the abuse occurred when she was nine years old but she explained that she told Ms. Baugh about more incidents than she testified to at trial and that these incidents occurred in rooms other than the den. She also admitted that she told Ms. Baugh that she left the hotel room and returned but explained that no one asked her about leaving on direct examination. She testified

that she told Ms. Baugh that the defendant offered her money to take her clothes off, so she did and sat on his lap in the hotel room. She denied telling Ms. Baugh that she took a nap at the hotel room and stated that she did not remember that happening. She also admitted that the defendant never threatened her or harmed her physically. She also testified that she entered someone's home without permission in March 2003.

On redirect examination, the victim explained that she and the district attorney had discussed that there would be some areas of the incident about which she would not be questioned. Specifically, the district attorney had told her that he would not question her about the defendant offering her money in exchange for sexual acts and about leaving the hotel room and returning. She stated that she was testifying truthfully. She further said that she did leave the hotel room and thought about running away on the day of the incident because she anticipated that the defendant would ask her for sex. She also anticipated that the defendant would offer her money in exchange for sex. She recalled that there was a discussion about going to the hotel room on their way to lunch that day. She admitted that she did not say anything to the defendant about going to the hotel room, but she testified that she did not want to have sex with him. She explained that her statements differed because she would remember other instances as she was questioned by investigators and that she would not give all the details to her friends to whom she reported the abuse. She also testified that she felt like her mother stopped listening to her once she allowed the defendant to move back into the home. She said that since the allegations came to light in 2003, her mother divorced the defendant and that she now has some peace and is feeling better about herself after feeling very ashamed of what the defendant had done to her.

Catherine Gallop testified that she knew the victim through church. She recalled that C.E. alerted her to the victim's report of abuse and Ms. Gallop approached the victim to see if she wanted to talk about it. She described the victim as "very quiet" with "a lot on her mind." Ms. Gallop recalled that the victim told her the abuse began when she was nine years old. She also remembered the victim describing her first report to her mother and the defendant leaving the home for some time. Ms. Gallop told the victim that she would talk to their pastor who might want her to talk to the victim's mother. She stated that the victim never asked her to involve DCS. She recalled that the victim "seemed embarrassed and sad, and she blamed herself" when recounting what had happened. On cross-examination, Ms. Gallop testified that she discussed the incident with the victim on another occasion and took notes after their pastor recommended that she do so. She consulted her sister, who is a social worker, for questions she should ask the victim in preparation for reporting the abuse to DCS. Ms. Gallop testified that she informed the victim of any action she was going to take throughout her discussions with the victim, but that the victim did not specifically ask her to contact authorities.

C.E. stated that the victim was her best friend and that they knew each other through church. She said that it was her idea for the victim to talk to Ms. Gallop. She recalled that the victim seemed "scared to tell." On cross-examination, she remembered that the victim told her about the abuse when C.E. was sleeping over at her house. She stated that she told the victim that she had been abused also. C.E. described the victim as a generally happy girl but that she was embarrassed by the incidents with the defendant. On redirect examination, C.E. testified that the victim told her that she

would often try to avoid being in the defendant's presence and that she would lock herself in her bedroom in order to protect herself from the defendant. C.E. testified that the victim also told her that the defendant would offer the victim money after he would "try to touch her or whatever."

Maureen Sanger, Ph.D., testified that she was employed as a psychologist for fifteen years at Our Kids' Center, a sexual abuse center associated with Nashville General Hospital. She stated that she conducted an initial interview of the victim on November 7, 2003. The victim reported that the defendant began abusing her at age nine. Dr. Sanger's account of the abuse was consistent with that testified to by the victim.

Holly Gallion testified that she is a pediatric nurse practitioner employed with Our Kids' Center. Ms. Gallion testified that the victim presented as a fully developed adult female, having completed all stages of puberty. Ms. Gallion testified that the victim's medical examination revealed no present or past trauma to her vaginal area. However, she explained that digital or attempted penile penetration would not necessarily produce trauma or tearing. Ms. Gallion also testified that the examination revealed no trauma to the victim's rectum, but she stated that was consistent with the victim's report that the defendant used Vaseline when he anally penetrated the victim. She testified that the center conducts approximately eight hundred examinations each year and that ninety-four to ninety-seven percent of the children have normal exams.

The victim's mother testified that she married the defendant in 1996 after dating a little over a year. The couple lived with the victim and their infant son in Davidson County until the family moved to La Vergne in May 1998.² She stated that the defendant was involved in the victim's school and athletic activities but that she was the disciplinarian. Regarding the victim's 2001 report to her, the victim's mother said that she confronted the defendant who explained that he accidentally touched the victim between her legs as he removed the victim's hands from between her legs while he was attempting to awaken her from the couch; the defendant denied any other allegations and told her that he would not jeopardize his family or career. Nevertheless, the victim's mother stated that she believed the victim and told the defendant to leave; he returned about a week later because their son was crying for him to come home and the defendant was the family's only source of income.

The victim's mother recalled that she realized when the victim was twelve years old that she had begun locking her bedroom door. When she asked the victim why she was locking her door, the victim told her to keep her little brother out. Even after asking the victim not to lock her door, she continued to do so. The victim's mother testified that she never reported the 2001 allegations to the authorities because she was never sure it had happened, but that she decided that she "would keep [her] eye on [the situation] just in case."

The victim's mother testified that the victim was involved in several basketball camps in the summer of 2003 and that the defendant was responsible for transporting her to the camps. She testified that one camp was held at Tennessee State University in "the latter part of June." Although

² The victim's mother testified that the victim's birthday is June 7, 1988, and the victim's brother was born on April 20, 1997.

unable to recall specifically going to any hotels in the summer of 2003, the victim's mother testified that the family would sometimes go to the Holiday Inn at Hickory Hollow; she stated that they never went to the Hampton Inn and Suites near the airport.

The victim's mother stated that since the victim spoke to authorities at school on October 17, 2003, the defendant never returned to the family home. She spoke with the defendant on his cellular telephone who insisted that the victim "was lying on him" and he had not done anything. The victim's mother told him "to come and get his stuff and get out." She confronted him with his promise not to touch her again made after the 2001 allegations, and the defendant again denied ever touching the victim. She stated that the defendant told her he was sorry for what the family was going through.

After the investigators told her the details of the victim's 2003 allegation, the victim's mother looked for documentation to confirm whether the defendant had stayed at a hotel contemporaneous to the basketball camp. The victim's mother testified that at the time of the allegations, the defendant was driving a green Plymouth Grand Caravan vehicle. She discovered a bank statement from her husband's debit card account containing a debit for Ruby Tuesday's Restaurant and the Hampton Inn and Suites on June 27, 2003. She also discovered statements with an address listed for Auburn, Kentucky but testified that the defendant had family in Kentucky but had not lived there since she had known him. She was unaware of the Hampton Inn and Ruby Tuesday charges but upon reading the statement, the victim's mother immediately realized the significance of them and turned over the bank statement to the police. The victim's mother testified that she knew of no legitimate reason for the defendant to take her daughter to the Hampton Inn and Suites on that date.

On cross-examination, the victim's mother denied ever thinking that the defendant had been to the hotel with another woman and stated that "I thought of my child because of that date." She testified that she filed for divorce in August 2004 and explained that she did not have the money to file sooner. The victim's mother denied continuing a relationship with the defendant after October 2003. On redirect examination, the victim's mother testified that she was unaware of any conflicts between the defendant and the victim and that she "truly" knew of no motive the victim would have to make up the accusations. She did recall telling the victim that she did not know who to believe because "[t]hat was at the point where I was still going back and forth"; but she stated that since seeing the receipts and listening to her daughter's report, she is now sure that her daughter is telling the truth.

Marlene Baugh testified that she was part of a special investigative unit with DCS in 2003. As part of a special unit, she was responsible for investigating child abuse and neglect allegations throughout Middle Tennessee that involved teachers, foster parents or "anyone whose livelihood could depend on their interaction with children." When Ms. Baugh first interviewed the victim on October 17, 2003, she asked the victim if she knew why she was being interviewed and the victim told her that "she thought it was involving a situation with her father where he had been doing bad things to her." Ms. Baugh testified that based upon the victim's report of the 2003 incident, she and the investigators were able to ascertain the location and date of the offense. She recalled the victim

told her that she left the hotel room briefly “because of the past experiences she had been through she understood at this point in time what was going to happen.” The victim told Ms. Baugh that when she returned to the room, the defendant was naked and offered her money to take off her clothes and to “climb on top of his lap.” Ms. Baugh acknowledged that the victim did not disclose any allegations of anal penetration during the first interview, but did report it for the medical examination. When she asked the victim why she did not initially report that, the victim told Ms. Baugh that she did not ask; Ms. Baugh testified that “in all cases” the detail of the information was directly conditioned upon the questions asked by the case worker. The victim also told Ms. Baugh that she had reported the abuse to her mother previously and that the defendant had moved out of the home for some time but returned after the defendant “said he was sorry for what he had done.”

Brett Gipson testified that he was a detective with the Youth Services Division of the Metropolitan Police Department in October 2003 and that he investigated the victim’s allegations.³ He testified that based upon the victim’s report, he confirmed the victim’s participation in the basketball camp at TSU and that it ended on Friday, June 27. He also recalled receiving bank records from the victim’s mother which indicated that the defendant had rented a room at the Hampton Inn and Suites near the airport and had eaten at a nearby Ruby Tuesday’s Restaurant on June 27. Mr. Gipson testified that he interviewed the defendant and that the defendant denied all allegations of abuse. The defendant told Mr. Gipson that he avoided normal fatherly affection with the victim because “he was afraid of allegations of sexual abuse or improper touching and that he wouldn’t even hug children at school.” When confronted with the allegation about the hotel, the defendant initially denied taking the victim to a hotel but then told investigators that the entire family had gone to the Holiday Inn at Hickory Hollow that week. The defendant also told Mr. Gipson that one of the victim’s friends accompanied the family on the trip. However, Mr. Gipson testified that his investigation never revealed any documentation regarding a trip to the Holiday Inn and no witnesses were able to corroborate the defendant’s statement. The defendant consistently denied the allegations and could not offer an explanation or motive for the victim to accuse him.

Celester Elliott, the General Manager of the Hampton Inn and Suites on Donelson Pike, testified that the defendant registered at the hotel on June 26, 2003, using an address of Auburn, Kentucky. The registration card showed that the defendant registered only himself, with no additional adults or children. The card also reflected a charge for the rental of an in-room adult movie. Mr. Elliott testified that the defendant registered his vehicle, a Green Plymouth Grand Voyager van. The card reflected that the defendant checked-in to the room at 2:31 p.m. and rented the movie at 2:54 p.m. The registration card also reflected a check-out time of 11:06 am the next day which Mr. Elliot explained could occur if the registrant had left the night before and left the key in the room.

Based upon this proof, the jury was unable to reach a verdict on counts one and two of the indictment related to the acts that were alleged to have occurred when the victim was nine years old; the trial court entered judgments of acquittal on these counts. Regarding the 2003 hotel room allegations, the jury convicted the defendant as follows: lesser included offenses of attempted

³ By the time of the trial, Mr. Gipson had become a licensed attorney.

vaginal rape, attempted anal rape and attempted digital rape in Counts Three, Four and Five; lesser included offenses of attempted incest in Counts Six, Seven, and Eight; and two counts of sexual battery by an authority figure as charged in Counts Nine and Ten.

ANALYSIS

Sufficiency of the Evidence

The defendant contends that the evidence is insufficient to support his convictions for attempted rape, attempted incest, and sexual battery by an authority figure. Relative to the attempted rape convictions and attempted incest convictions, the defendant argues that the jury chose not to believe the testimony of the victim as indicated by his conviction for lesser offenses and that there is no medical testimony to support her allegations. Relative to the sexual battery by an authority figure convictions, he argues that “[t]he record is completely devoid of any evidence that [the defendant] used his parental or custodial authority over [the victim] to accomplish these acts [of sexual battery].” Interestingly, we note that the defendant’s argument regarding the aggravated sexual battery convictions appears to admit that “these acts” were committed, while denying them in his argument regarding the attempted rape and attempted incest convictions. The State succinctly argues that “[a]ny rational juror could find that the defendant took material steps toward accomplishing the goal of placing his fingers and penis in the genitalia and anus of his minor stepchild without her consent” and that the defendant exercised parental authority over the victim as indicated by his responsibility for transporting her to and from the basketball camp. Following our review, we agree with the State.

We further note as plain error that the trial court should not have merged the attempted incest convictions into the convictions for attempted rape because each of these offenses are legally and factually distinct. State v. Britzman, 639 S.W.2d 652, 654 (Tenn. 1982); William Hackworth v. State, No. M2003-02148-CCA-R3-PC, 2004 WL 1686610, at *3 (Tenn. Crim. App. July 28, 2004) (incest is not a lesser included offense of rape; both convictions are appropriate). Therefore, upon remand, the convictions for attempted incest shall be reinstated and the trial court shall determine the appropriate sentence for each offense.

An appellate court’s standard of review when the defendant questions the sufficiency of the evidence on appeal is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original). The appellate court does not reweigh the evidence; rather, it presumes that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions regarding witness credibility, conflicts in testimony, and the weight and value to be given to evidence were resolved by the jury. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). A guilty verdict removes the presumption of innocence and replaces it with a presumption of guilt, and on appeal the defendant has the burden of illustrating why the evidence is insufficient to support the jury’s verdict. Id.; State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

This standard applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. State v. Pendergrass, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

A conviction for criminal attempt, as relevant to this case, requires proof that the defendant acted “with the intent to complete a course of action or cause a result that would constitute the offense [of rape or incest], under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.” Tenn. Code Ann. § 39-12-101(a)(3). The offense of rape is defined, relevant to this case, as “the unlawful sexual penetration of a victim by the defendant . . . accomplished without the consent of the victim and the defendant knows or has reason to know that at the time of the penetration that the victim did not consent.” Tenn. Code Ann. § 39-13-503(a)(2). Incest, as relevant to this case, is defined by statute as “the sexual penetration with a person, knowing the person to be . . . [a] stepchild.” Tenn. Code Ann. § 39-15-302(a)(1). The offense of sexual battery by an authority figure, as relevant to this case, requires proof that the defendant committed “unlawful sexual contact with the victim [and that] the defendant had, at the time of the offense, parental or custodial authority over the victim and used the authority to accomplish the sexual contact.” Tenn. Code Ann. § 39-13-527(a)(3)(B).

The record reflects that the defendant took his fifteen-year-old stepdaughter to a hotel room where he rented an adult video, undressed, and asked the victim to undress. The defendant tried to vaginally and anally penetrate the victim with his penis. When the victim began to cry, the defendant digitally penetrated her vagina and rubbed her breasts and buttocks instead. These acts occurred for “at least an hour.” Throughout the incident, the victim was “speechless . . . numb . . . [and] scared.” We conclude that there is sufficient evidence to support the convictions in this case.

Admission of Other Allegations of Sexual Abuse

The defendant contends that the trial court erred in admitting evidence of other sexual abuse committed by the defendant upon the victim at their home in Rutherford County, Tennessee. The defendant argues that the probative value of the evidence was outweighed by the danger of unfair prejudice. The State argues that admission of the evidence was necessary to fill the chronological void in the evidence created by the defendant’s cross-examination of the victim and that the probative value of the evidence was not outweighed by the danger of unfair prejudice. Following our review, we agree with the State.

The record reflects that the State filed a pretrial notice of its intention to admit evidence of sexual abuse committed by the defendant against the victim at their home in Rutherford County. These prior bad acts of the defendant were also the subject of a pending indictment in Rutherford County at the time of this trial. During the pretrial hearing, the State commented that based upon discussions with defense counsel regarding inconsistencies in the victim’s statements:

it became apparent from our perspective, that [defense counsel] were likely to try and impeach her on the inconsistencies in those allegations, which raises then the specter

of how do we explain sort of those inconsistencies in the disclosure without getting into the issues involving Rutherford County.

Quite frankly I'm almost to a point where I think I can try my case solely on the incidents that are in Nashville without getting into any of the Rutherford County behavior unless it becomes an issue by way of cross-examination, which I think it's going to. So if it does, then there's no way of explaining those inconsistencies and the history and no way of explaining the progression of conduct without getting into the information about what happened in Rutherford County. Because then there's a clear progression in the sexual activity that encompasses that six-year-time period.

. . . .

So, I mean, I can anticipate that they're going to ask those kinds of questions about her inconsistencies. And then we would have to explain that she's not just relating three separate incidents that happened here in Davidson County, she's being asked to recall and describe a course of conduct that involves six years worth of alleged sexual abuse.

The defendant argued at the pretrial hearing that any inconsistencies discussed on cross-examination would be limited to those in her statements regarding the Davidson County incidents specifically. Without making any pretrial ruling, the trial court simply warned the defendant that the district attorney

says that he can try this without reference to those [Rutherford County offenses]. However if you were to get into issues, you may raise the specter that this would have to be explained.

. . . .

I would have to hear the testimony before I could say whether the [State] could then get up and explain any inconsistencies by using all this.

At trial, the defendant confronted the victim with certain inconsistencies between her direct testimony and her report to Ms. Baugh. Specifically, the defendant asked the victim why she had neglected to mention leaving the hotel room momentarily and coming back during her direct testimony. The victim responded that the State "didn't ask me about leaving and coming back to the hotel." When confronted with why she had not testified on direct that the defendant offered her money in exchange for taking off her clothing, the State requested a jury-out hearing regarding the admissibility of the other bad acts and argued that:

it's become patently obvious that the impeachment that's being done here with regard to the inconsistencies is creating extreme difficulties in her response to the questions. And part of that is because of my instructions on how she was to respond to questions and provide information in order to avoid 404[(b)] issues. Counsel is clearly opening

the door here. But the more this goes on, the more difficult it becomes for her [to] follow the instructions I've given her about not making reference to other situations . . . they're clearly opening the door to prior circumstances, how this child anticipated what was going on, what her actions and conduct were on that particular day in response to the scenario.

During the jury-out hearing, the State indicated that the victim had been specifically told what areas would not be discussed on direct examination in an effort to avoid testimony regarding other acts the defendant had committed in Rutherford County. Based upon the State's limitation of direct testimony to avoid other acts, the victim was vulnerable to impeachment by the defendant on cross-examination. The defendant argued that he did not know that the State was limiting proof to the extent that certain facts about the Davidson County offenses would not be discussed due to their similarity with the Rutherford County acts and that he was only impeaching the victim with omissions relative to the Davidson County offenses. The court noted that once the victim is impeached, she can be allowed an opportunity to explain why she omitted certain facts from her direct testimony and that she had explained the omissions, to some extent, by saying that the State had not asked her about certain facts. The State argued further that "[s]ince [defense counsel] chooses to exploit the issue of inconsistencies, the witness now is in a position to have to be able to explain those inconsistencies As far as the State is concerned, they have opened the door to the entire panoply of history that's gone on here." The trial court determined that the State would be allowed to "minimally" ask questions about the history of the defendant's abuse based upon its finding that "a void of this [information] is going to totally confuse the jury." The trial court also found that the probative value of the evidence "far" outweighed the prejudicial effect.

On redirect examination, the victim testified that she limited her testimony on direct upon the advice of the district attorney. She stated that she was not attempting to mislead the jury and was only telling the truth regarding the questions that were asked of her. She stated that left the hotel room because she anticipated that the defendant might ask her for sex and that he might offer her money for sex. She stated that the defendant actually discussed having sex on their way to the hotel that day but that she did not say anything to him about it. She stated that the defendant never threatened her physically but that she was ashamed and embarrassed by what the defendant had done to her. Upon conclusion of the redirect examination, the trial court gave the following limiting instruction:

[L]adies and gentlemen, you have heard references to other events that might have occurred. You may only consider that for background information or to give a complete story of this situation, however, keep in mind that [the defendant] is only on trial for certain events that are listed in the indictment and not others.

When reviewing a trial court's decision to admit evidence, we will not reverse that decision unless the trial court has abused its discretion. See State v. DuBose, 953 S.W.2d 649, 652-53 (Tenn. 1997). Similarly, when evidence is proffered pursuant to Tennessee Rule of Evidence 404(b) and the record reflects that the trial court has substantially complied with the procedural requirements

of that rule, the trial court's decision to admit or exclude evidence on the basis of Rule 404(b) will only be reversed upon a showing of an abuse of discretion. DuBose, 953 S.W.2d at 652.

In State v. Gilliland, 22 S.W.3d 266 (Tenn. 2000), our supreme court discussed the admissibility of background evidence containing proof of prior bad acts of a defendant. The court noted that "in every case in which evidence of other crimes, wrongs, or acts is offered, the trial judge should carefully scrutinize the relevance of the evidence and reasons for which it is being offered." Gilliland, 22 S.W.3d at 271. Additionally, the court noted that "evidence offered to show contextual background need not be excluded simply for the reason that it involves evidence of prior acts. If the contextual evidence is relevant to an issue other than criminal propensity and its probative value is not outweighed by the danger of unfair prejudice, then that evidence may be properly admissible." Id. However, the court also warned that "general background evidence used to relate the full story of an offense is rarely probative of an actual issue at trial." Id. The court further stated that

[a] general policy that bars background evidence merely because it does not directly bear upon a material issue ignores the fact that such evidence is often crucial to understanding the other material evidence at trial, and the absence of background evidence could have detrimental effects on the jury's comprehension of the offense in question. *Events do not occur in a vacuum, and in many cases, knowledge of the events surrounding the commission of the crime may be necessary for the jury to "realistically evaluate the evidence."*

Id. at 271-272 (emphasis added) (citations omitted). In summary, the supreme court held that "when the state seeks to offer evidence of other crimes, wrongs, or acts that is relevant only to provide a contextual background for the case, the state must establish, and the trial court must find, that (1) the absence of the evidence would create a chronological or conceptual void in the state's presentation of its case; (2) the void created would likely result in significant jury confusion as to the material issues or evidence in the case; and (3) the probative value of the evidence is not outweighed by the danger of unfair prejudice." Id. at 272.

In this case, the State attempted to limit its proof to only those acts relevant to the indicted offenses but alerted the trial court pretrial to its concern that the defendant's cross-examination of the victim might open the door to the discussion of the defendant's history of sexual abuse committed upon the victim. As anticipated, the defendant attempted to impeach the victim regarding factual details of the offenses which were included in her report to DCS but absent from her direct testimony at trial. For some time throughout cross-examination, the victim explained the absence of the details as caused by not being asked about it on direct testimony. After receiving this explanation, the defendant continued to question the victim regarding the absence of details; ultimately, the State objected on the basis that the defendant had now "opened the door" to evidence of the history of abuse, i.e. other bad acts of the defendant.

The trial court found that the evidence could be admitted minimally in order to prevent jury confusion caused by the contextual void in the proof precipitated by the defendant's cross-

examination of the victim. Furthermore, despite the defendant's argument that the trial court applied the wrong balancing of probative versus prejudice, implicit in the trial court's finding that the probative value of the evidence far outweighed the danger of unfair prejudice, is the appropriate finding pursuant to Rule 404(b) that the probative value of the evidence is not outweighed by the danger of unfair prejudice. We further note that the State adhered to the trial court's ruling and, in our view, only elicited testimony from the victim to allow her an opportunity to explain omissions in her direct testimony – notably without any specific reference to acts that were alleged to have occurred in Rutherford County; the victim's testimony on redirect that she anticipated that the defendant might ask her for sex and that he might also offer her money in exchange for sex were minimal and general references to the history of abuse committed by the defendant. Furthermore, we conclude that this contextual evidence is probative of why the victim, when presented with an opportunity to leave, did not leave in anticipation of what she knew would ultimately occur. See, e.g., State v. Evangeline Combs and Joseph D. Combs, Nos. E2000-02801-CCA-R3-CD and E2000-02800-CCA-R3-CD, 2002 WL 31118329, at *51 (Tenn. Crim. App. Sept. 25, 2002), app. denied (Tenn. Jan. 27, 2003) (“Without knowledge of her life's experiences . . . , the jury may have had difficulty understanding the reasons for her submissiveness and reluctance to escape when opportunities to do so presented themselves”). For these reasons, we conclude that the trial court did not err.

Sentencing

The defendant contends that the trial court erred by imposing consecutive sentences. Specifically, he contends that the trial court failed to determine whether consecutive sentencing is reasonably related to the severity of the offenses, serves to protect the public from further criminal conduct by the defendant, and is consistent with the general principles of sentencing as required by State v. Wilkerson, 905 S.W.2d 933 (Tenn. 1995). The State argues that the fact that these offenses involved the sexual abuse of a minor obviates the need for these findings.

Consecutive sentencing is guided by Tennessee Code Annotated section 40-35-115(b), which states in pertinent part that the trial court may order sentences to run consecutively if it finds by a preponderance of the evidence that

[t]he defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims[.]

Tenn. Code Ann. § 40-35-115(b)(5) (2003). The trial court is required to “specifically recite the reasons” behind imposition of a consecutive sentence. See Tenn. R. Crim. P. 32(c)(1); see, e.g., State v. Palmer, 10 S.W.3d 638, 647-48 (Tenn. Crim. App. 1999) (noting the requirements of Rule 32(c)(1) for purposes of consecutive sentencing).

In determining that the defendant should serve some of his sentences consecutively, the trial court found that

Factor number five is clearly made out by the proof in this case, and that is convicted of two or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and the victim, the timespan of his undetected sexual activity, the nature and scope of the activity, and the extent of the residual damage to the victim. All of those aggravating circumstances were present in this case. There was an extensive period of time when they went undetected. Though there was a time that she disclosed to her mother, her mother didn't tell anybody, and the defendant came back to the house and continued on. There was obviously residual or minimal damage. [The victim] has chosen not to participate in counseling. She still has testified to the damage that was done to her.

We conclude that the trial court's statement on the record of its reasons for imposing consecutive sentences met the requirements established in Tennessee Code Annotated section 40-35-115(b)(5) and Tennessee Rule of Criminal Procedure 32(c)(1). Furthermore, we agree with the State that the trial court was not required to make any additional findings in light of its application of subsection (b)(5) to impose consecutive sentences. State v. Lane, 3 S.W.3d 456, 461 (Tenn. 1999) (Wilkerson findings limited to those cases involving the application of the dangerous offender factor). Therefore, we affirm the trial court's imposition of consecutive sentences in this case.

CONCLUSION

Based upon our review of the record, we conclude that there is sufficient evidence to support the jury's verdicts for three counts of attempted rape, three counts of attempted incest, and two counts of sexual battery by an authority figure. The trial court did not erroneously admit evidence of sexual abuse of the victim by the defendant that occurred in Rutherford County. The trial court's imposition of consecutive sentences is affirmed. However, we conclude that the trial court erred when it merged the attempted incest convictions into the attempted rape convictions; on remand, those convictions should be reinstated and the trial court shall impose sentences. Accordingly, the judgments of the trial court are affirmed in part; reversed in part; and the case is remanded for sentencing on the attempted incest counts.

D. KELLY THOMAS, JR., JUDGE